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No. 92-1740

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

HUDSON T. HARRISON, HARRISON CONSTRUCTION INCORPORATED, a corporation, and THOMAS P. WARD,

Cross-Petitioners,

v.

DEAN WITTER REYNOLDS INC., a corporation,

Cross-Respondent.

On Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

CROSS-RESPONDENT'S BRIEF IN OPPOSITION TO THE CROSS-PETITION

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CROSS-RESPONDENT'S BRIEF IN OPPOSITION TO THE CROSS-PETITION

On April 29, 1993, Hudson Harrison, Harrison Construction Company (collectively "Harrison") and Thomas Ward, their attorney, filed a Cross-Petition for Writ of Certiorari ("Cross-Petition") seeking review of the Seventh Circuit's holdings that:

(a) On the undisputed facts, no reasonable person would have supposed that Dean Witter[1] had author-

[1] Cross-Respondent Dean Witter Reynolds Inc. is a subsidiary of Sears, Roebuck & Company.

ized the personal loan transactions on which Harrison's claims are based; and

(b) it lacked jurisdiction over Mr. Ward's appeal of an order entering Rule 11 sanctions against him, alone, as he was not named as one of the appealing parties in the required Notice of Appeal.

Dean Witter first received a copy of the Cross-Petition on May 3, 1993.

STATEMENT OF THE CASE

The Seventh Circuit affirmed summary judgments in favor of Dean Witter on nine federal and state law claims premised on the common law theory of apparent authority on the basis that no reasonable person would naturally suppose that Dean Witter had authorized the relevant transactions in light of the following undisputed facts—all of which are conclusively established by Harrison's own documents or sworn testimony:

1. Hudson Harrison, millionaire and sole owner of Harrison Construction Co., is not and never was a customer of Dean Witter. C.App. 1, 42.[2]
2. Harrison was told by Carpenter and Kenning, two Dean Witter employees, that if he loaned funds to them, they would use those funds to buy municipal bonds in their personal accounts at substantial discounts available only to employees (and not to customers) which would allow them to pay Harrison annualized interest rates of from 18 to 60%. C.App. 9, 20 and 21.
3. Harrison and his company made approximately twenty such loans, in the total amount of approx-

[2] References to Cross Appendix ("C.App.") refer to the appendix filed by Dean Witter in the Seventh Circuit that contains the supporting portions of the Record on Appeal.

imately $4 million, all of which were by checks or wire transfers made payable to Carpenter personally and sent to his home or personal bank account. C. App. 10, 13, 15, 18 and 19.

4. As his sole evidence of these transactions, Harrison received the personal promissory notes of Carpenter and Kenning. C.App. 20.

5. Carpenter and Kenning also furnished Harrison with (a) duplicate promissory notes for each of his company's loans that substantially understated the agreed upon and expected return and (b) phony IRS Forms 1099 that substantially understated the interest that Harrison believed he and his company had been paid and that listed "John Carpenter" as the payor of that interest. C.App. 28.

6. Harrison never received any account statements, customer agreements, Forms 1099, checks or any other document from Dean Witter or bearing Dean Witter's name. C.App. 42.

REASONS THE CROSS-PETITION SHOULD BE DENIED

I. INTRODUCTION

The Cross-Petition presents two questions, neither of which raises any issue significant enough to warrant this Court's consideration. By the first question, Harrison simply seeks review of what he characterizes as a mistaken application of a concededly correct statement of the Illinois law of apparent authority. Cross-Petition ("C.P.") at 4, 9. Moreover, the argument advanced in support of this question both misstates the evidence and misapprehends the relevant legal principles. The second question, by which Mr. Ward (Harrison's attorney) would challenge the Seventh Circuit's decision that it lacked jurisdiction over his appeal of an order imposing Rule 11 sanctions

against him, seeks to have this Court overrule its decision in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988). Yet, Mr. Ward's supporting argument raises no issues that would warrant revisiting *Torres*. For these reasons, the Cross-Petition should be denied.

II. HARRISON'S APPARENT AUTHORITY ARGUMENT MISREPRESENTS THE UNCONTROVERTED EVIDENCE AND MISAPPREHENDS THE RELEVANT LAW

Harrison's argument in support of the Cross-Petition's first question rests on three equally false premises. The most surprising of these is the contention that there is no, or insufficient, evidentiary support for the Seventh Circuit's statements that: (1) Harrison was told and expected that the funds he loaned to Dean Witter employees Carpenter and Kenning would be used in Carpenter's personal employee account; and, (2) Harrison expected to receive enhanced returns by benefiting from the lower commissions and other discounts granted only to employees, and not to customers, of Dean Witter. See C.P. at 7 n. 3 and 10-14. As Harrison should certainly be aware, however, his own sworn and uncontroverted testimony provides conclusive evidentiary support for these statements.

The second fallacious premise of Harrison's argument is that, despite the obviously irregular and unorthodox nature of the transactions involved, the issue of apparent authority may not be resolved on a motion for summary judgment. This is simply not the law. As the Seventh Circuit correctly recognized, if a transaction is irregular on its face or appears as if it might be to the detriment of the principal, a plaintiff may not rely on the doctrine of apparent authority under the law of Illinois without in-

vestigating whether the transaction was authorized.[3] Thus, because Harrison admits that he did not investigate whether Carpenter and Kenning were authorized to engage in the highly irregular transactions involved, summary judgment in this case is not only permitted, but required.

The final unsupportable premise of Harrison's argument is that, based on the mere fact that others entered into similar "deals", a jury could excuse Harrison's failure to recognize the obviously unauthorized nature of those "deals". This premise is fatally flawed. First, there is absolutely no evidence in the record as to whether any of these "others" believed that they were dealing with Dean Witter. Yet, such a belief is one of the necessary predicates of Harrison's argument. Second, even if we accept Harrison's unsupported assumption of belief, that belief does not excuse Harrison (or the others) from having failed to investigate Carpenter's and Kenning's authority to enter into transactions which, as evidenced by Harrison's own sworn testimony and documents, were not only irregular but designed to cheat Dean Witter of commissions and the United States Government of taxes.

A. Harrison's Own Testimony Establishes That (1) He Understood That The Funds He Loaned To Carpenter And Kenning Would Be Used In Their Personal Employee Accounts (2) To Dean Witter's Disadvantage And His Benefit

The Seventh Circuit held that no reasonably prudent person would have believed that Dean Witter had author-

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[3] *E.g., Paine v. Sheridan Trust and Savings Bank*, 342 Ill. 342, 349, 174 N.E.2d 368 (1930); *Evanston Bank v. ContiCommodity Services, Inc.*, 623 F.Supp. 1014, 1033 (N.D. Ill. 1985); *see also* Restatement (Second) of Agency §§165 comment c and 166 comments b and c (1958).

ized Carpenter and Kenning to borrow funds from Harrison to use in their own employee accounts in order that Harrison could obtain the benefit of Carpenter's and Kenning's employee discounts. The Cross-Petition asserts, however, that there is no evidence that Harrison understood that his funds would be used in Carpenter's personal employee account or that he expected to benefit from employee discounts to which he was not entitled. C.P. at 7 n. 3 and 10-12. These assertions are so far off the mark that one wonders what record is being referenced.

1. Harrison testified several times that he understood that any funds he loaned to Carpenter and Kenning would be used in their personal employee accounts

The Cross-Petition asserts that "[t]here is no evidence that Harrison or anyone else was told that the money [Carpenter and Kenning borrowed from him] would be placed in Carpenter's employee account at [Dean] Witter. . . ." C.P. at 7 n. 3. This assertion is baseless.

In recounting how Carpenter and Kenning explained the transactions to him, Harrison testified as follows:

> Q. Now, did [Carpenter or Kenning] . . . tell you that [the bond transactions would be] . . . done in [Carpenter's or Kenning's] . . . personal account?
>
> A. It was my understanding it was done in their personal account at Dean Witter.

See Appendix, Exhibit A.[4] In explaining why he sent all of his checks and wire transfers to Carpenter's home or

[4] The cited portions of Harrison's testimony appear in the Record on Appeal at Docket Nos. 223-3 and 223-4. Copies of this testimony are also included in the Appendix hereto.

personal bank account, Harrison reiterated this understanding:

> Q. Did Mr. Carpenter ever give you any explanation as to why he wanted the checks sent to his personal [bank] account or to him at his home?
>
> . . .
>
> A. Because these [bond] transactions were being done in his personal account at Dean Witter, he preferred to have the checks sent to him personally.

Appendix, Exhibit B. This testimony is not ambiguous. Nor is there any contrary testimony. Thus, the assertion that there is "no evidence" for the statement that Harrison loaned funds to Carpenter and Kenning to be used in Carpenter's personal employee account is simply false.

2. Harrison's own uncontradicted testimony also establishes that he expected to increase his profits by obtaining the benefit of employee discounts to which he was not entitled

Harrison also asserts that the Seventh Circuit's statement that he expected to benefit from the lower commissions charged Dean Witter employees but that were not available to customers "is factually flawed." C.P. at 11. Once again, it is Harrison's assertion, not the Seventh Circuit's statement, that is flawed.

Immediately following his testimony that he understood that the bond transactions Carpenter and Kenning were proposing were to be "done" in their personal employee accounts, Harrison stated, under oath, as follows:

> Q. Did you ask or were you told why it had to be done in their account as opposed to in your account?
>
> A. Yes.

Q. Or an account that you would open?

A. The reason was that the difference in the commissions made it a more lucrative profit on the bonds.

Q. What commissions are you referring to?

. . .

A. I understood that in their own accounts, they did not pay commissions or were not charged commissions. Therefore, they could buy them at the lower price than they would charge a customer.

Q. So you could do this same thing with Dean Witter directly but to avoid paying commissions to Dean Witter, they suggested that you do it through them personally?

. . .

Q. Is that what was said to you?

A. That was part of it, yes, I believe. Well, that was my understanding of it.

. . .

Q. To avoid having to pay commissions to Dean Witter, you would do it through their account?

A. I don't think they stated it to avoid, they said that's the way it worked.

Appendix, Exhibit C.

Thus, Harrison's own sworn testimony provides unambiguous, unequivocal and uncontroverted evidence for the truth of the statement that Harrison asserts is "flawed". Yet, Harrison would totally disregard this testimony, indeed assume that it does not exist, and substitute an involved explanation of the "real" economics of bond transactions and the commissions charged by broker-dealers. *See* C.P. at 11-14. Harrison offers absolutely no factual support for this "tale", however. Moreover, even if his tale was supported by evidence, the obvious irrelevance

of any post-suit education Harrison may have received (as opposed to the critical relevance of his contemporaneous understanding of the transactions at issue) highlights the baselessness of the Cross-Petition's argument that the Seventh Circuit's apparent authority holding was not firmly and correctly founded upon the actual and undisputed facts of this case.

B. Summary Judgment Is Not Only Permitted But Required Where The Material Facts Are Not In Dispute And No Reasonable Juror Could Legally Sustain The Claim At Issue In Light Of Those Facts

Harrison does not dispute that the correct legal principles were applied in deciding the apparent authority issues. C.P. at 4. Rather, he argues that the Seventh Circuit incorrectly applied these principles and impermissibly resolved jury questions concerning the unusual and extraordinary nature of his transactions with Carpenter and Kenning. C.P. at 4, 8-16. Before Harrison can legitimately ask that such issues be submitted to a jury, however, he must be able to point to some *evidence* upon which the jury could decide the issue in his favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). This is something he cannot do.

For example, what evidence did Harrison adduce in over two years of discovery that could possibly support a conclusion that it was usual and customary, in the ordinary course of the securities business, for a broker-dealer to authorize its account executives to:

1. Share their employee discounts with non-employees to the disadvantage of their employer;
2. Instruct customers to make millions of dollars in payments to them personally, rather than to the firm, and to send those payments to their personal residences or bank accounts;

3. Issue their own personal promissory notes as the sole evidence of transactions in which the firm was involved;
4. Not issue the customary and usual account statements, confirmations, IRS Form 1099's and other documents; or
5. Issue phony duplicate promissory notes and phony IRS forms that substantially understated the agreed upon return and that listed the employee (rather than the firm) as the sole payor of such returns.

The answer, of course, is none—no affidavits, no expert or non-expert testimony, no Dean Witter documents, no treatises, no anything. Common sense tells us why; the transactions Carpenter and Kenning proposed were not usual and ordinary but decidedly irregular and illegal attempts to defraud Dean Witter. No reasonable juror could conclude otherwise on the basis of any *evidence* presented in this case. Therefore, the Seventh Circuit correctly decided that Dean Witter was entitled to summary judgment on the issue of apparent authority, as a matter of *law*.

C. The Simple Fact That Others Entered Into Transactions With Carpenter And Kenning Does Not Establish That These Others Believed That They Were Dealing With Dean Witter, Much Less That Any Such Belief Was Reasonable

The final premise of Harrison's argument is the fact that others entered into similarly irregular transactions is evidence that it was reasonable for him to have believed that Dean Witter had authorized his transactions. C.P. 4, 9-10. This argument exhibits the same basic misunderstanding of the role, indeed the concept, of evidence as do Harrison's other arguments.

The most fundamental flaw in Harrison's argument is that it is founded upon the assumption that all of the "others" believed that they were dealing with Dean Witter. There is absolutely no *evidence* in the record, however, concerning what any of the others believed. The mere fact that Harrison and others entered into the transactions does not constitute proof that any of them believed that they were dealing with Dean Witter, given that those transactions were so obviously designed to defraud Dean Witter of commissions.

A second necessary (and equally faulty) predicate of Harrison's argument is that any belief shared by as many as 126 people is presumptively reasonable. Harrison cites no law that suggests that such a presumption is appropriate. Nor does human experience support giving Harrison the benefit of such an inference. Moreover, in this case, any such presumption would be overwhelmingly rebutted by the uncontroverted evidence provided by Harrison's own documents and sworn testimony which conclusively establish the extremely irregular and unorthodox nature of the transactions at issue.

D. Conclusion

On the undisputed facts of this case, Harrison had more than ample notice that *his* transactions with Carpenter and Kenning were anything but regular. Consequently, under well-settled law that Harrison concedes the Seventh Circuit correctly identified, he had a duty to take reasonable steps to protect himself by investigating whether those transactions were, in fact, authorized by Dean Witter. Harrison admits that he did not conduct any such investigation. Therefore, the Seventh Circuit correctly decided that Dean Witter was entitled to summary judgment on the issue of apparent authority and Harrison's petition for review of that decision should be denied.

III. MR. WARD ADVANCES NO ISSUE IN SUPPORT OF THE CROSS-PETITION'S SECOND QUESTION THAT WARRANTS RECONSIDERATION OF THIS COURT'S DECISION IN *TORRES v. OAKLAND SCAVENGER CO.*, 487 U.S. 312 (1988)

The Notice of Appeal filed in this case on March 1, 1991 stated, in relevant part, that:

> Hudson T. Harrison and Harrison Construction, Inc., plaintiffs above-named, hereby appeal . . . from the final judgment . . . entered in this action on the 6th day of February, 1991.[5]

On June 10, 1991, Harrison filed his initial brief in the appeal, which included arguments addressed to the Rule 11 sanctions imposed solely against Mr. Ward in orders entered on June 28, 1990 (finding violations) and October 19, 1990 (setting the amount of the sanction). Also on June 10, 1991, Harrison filed a Motion to Amend the Notice of Appeal to add Mr. Ward as a named party/appellant. This motion was filed 94 days after the time (March 8, 1991) for filing an appeal under Federal Rule of Appellate Procedure 4(a)(1) had expired. On these facts, the Seventh Circuit held that, under *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), it lacked jurisdiction to hear any appeal of the Rule 11 orders or to consider the Motion to Amend. Mr. Ward petitions this Court to review this decision, claiming that it misconstrues *Torres* and is in conflict with the law of other Circuits. Mr. Ward is wrong on both counts.

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[5] The Notice of Appeal appears in the Record on Appeal at Docket No. 227.

Mr. Ward's first argument, also raised below, is premised on the contention that the result in *Torres*[6] turned on the fact that the party not named as an appellant in the notice of appeal had also failed to seek leave to amend that notice. As the Seventh Circuit recognized, however, "[t]he *Torres* Court actually stated, 'Nor did petitioner seek leave to amend the notice of appeal within the time limits set by Rule 4.' "[7] *Harrison v. Dean Witter Reynolds, Inc.*, 974 F.2d 873, 886 (7th Cir. 1992) (quoting *Torres*, 487 U.S. at 317). Mr. Ward also did not seek leave to amend the notice of appeal "within the time limits set by Rule 4". Therefore, his argument that the Seventh Circuit's decision misconstrues *Torres* has no basis.

Second, the cases Mr. Ward cites as evidence of a conflict among the circuits are completely inapposite. For example, in *Davis v. Locke*, 936 F.2d 1208 (11th Cir. 1991), the appellant's notice of appeal was filed prematurely, but a subsequent "amendment" to the notice was filed within the appropriate Rule 4 time limits for perfecting an appeal. On these facts, *Davis* held that the subsequent filing could be construed as constituting the required notice, despite its being styled an "amendment" to the premature and invalid notice—not that untimely amendments to add a party-appellant may be allowed.

Similarly, *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320 (9th Cir. 1991), is not, in any way, at odds with the

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[6] *Torres* held that a secretary's inadvertent omission of one of sixteen plaintiffs names in the list of the parties appealing included in the Notice of Appeal deprived the Court of Appeals of jurisdiction over the omitted plaintiff's appeal.

[7] The Seventh Circuit opinion is cited in full text at Appendix A of Dean Witter's Petition for Writ of Certiorari.

decision in this case. *Gilbreath* simply held that a timely notice stating that "all plaintiffs" were taking the appeal was sufficient to perfect an appeal on behalf of "all plaintiffs", despite the fact that each plaintiff was not individually named as an appellant in the body of the notice. 931 F.2d at 1323.

Finally, Mr. Ward argues that the naming requirements of Rule 3(c) should be enforced less rigidly "where the injured person is not a *party*, and the admittedly harsh result is based on a Rule that refers only to a party." C.P. at 18 (emphasis in original). If Mr. Ward was misled by Rule 3(c)'s reference to "party or parties taking the appeal", he should not have been. Shortly after *Torres* was decided, the Seventh Circuit dismissed an appeal of a sanctions order for lack of jurisdiction because the real party-in-interest, the sanctioned attorney, had not been named as a party-appellant in a timely Notice of Appeal. *Rogers v. National Union Fire Ins. Co.*, 864 F.2d 557, 559-60 (7th Cir. 1988); *see also Reynolds v. East Dyer Development Co.*, 882 F.2d 1249, 1254 (7th Cir. 1989).

The Seventh Circuit's decision—that the failure of the Notice of Appeal to identify Mr. Ward as one of the "parties taking the appeal" deprived it of jurisdiction to hear his appeal or his untimely motion to amend falls squarely within the dictates of *Torres*. As *Torres* stated:

> We believe that the mandatory nature of the time limits contained in Rule 4 would be vitiated if courts of appeals were permitted to exercise jurisdiction over parties not named in the notice of appeal. Permitting courts to exercise jurisdiction over unnamed parties after the time for filing a notice of appeal has passed is equivalent to permitting courts to extend the time for filing a notice of appeal. Because the Rules do not grant courts the latter power, we hold that the Rules likewise withhold the former.

487 U.S. at 315. Mr. Ward has raised no legitimate issue warranting reconsideration of this decision. Consequently, the Cross-Petition should be denied.

Respectfully submitted,

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APPENDICES

EXHIBIT A

[Harrison Deposition p. 476, lines 1-5; C.App. 9]

Q. Now, did whoever this was that you were talking to on the phone tell you that this was done in the person's personal account?

A. It was my understanding it was done in their personal account at Dean Witter.

EXHIBIT B

[Harrison Deposition p. 547, lines 6-14; C.App. 10]

MR. UHLENHOP: Q. Did Mr. Carpenter ever give you any explanation as to why he wanted the checks sent to his personal account or to him at his home?

A. I believe that's been asked before.

Q. No. Would you please answer the question.

A. Because these transactions were being done in his personal account at Dean Witter, he preferred to have the checks sent to him personally.

EXHIBIT C

[Harrison Deposition p. 476, lines 6-24 and p. 477, lines 1-14; C.App. 9]

Q. Did you ask or were you told why it had to be done in their account as opposed to in your account?

A. Yes.

Q. Or an account that you would open?

A. The reason was that the difference in the commissions made it a more lucrative profit on the bonds.

Q. What commissions are you referring to? I don't understand that.

A. I understood that in their own accounts, they did not pay commissions or were not charged commissions. Therefore, they could buy them at the lower price than they would charge a customer.

Q. So you could do this same thing with Dean Witter directly but to avoid paying commissions to Dean Witter, they suggested that you do it through them personally?

MS. PEZANOSKI: Objection, ambiguous and calls for speculation.

MR. UHLENHOP: Q. Is that what was said to you?

A. That was part of it, yes, I believe. Well, that was my understanding of it.

Q. That's what they told you to the best of your knowledge?

A. Yes.

Q. They being Mr. Carpenter or Mr. Kenning whoever was on that phone?

A. Right.

Q. To avoid having to pay commissions to Dean Witter, you would do it through their account?

A. I don't think they stated it to avoid, they said that's the way it worked.